Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 92-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,
Petitioner,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, ET AL.
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS FRANK F. FASI, CITY AND COUNTY OF HONOLULU AND DOUGLAS G. GIBB'S BRIEF IN OPPOSITION

RONALD B. MUN
Corporation Counsel
DAVID C. LAXSON
Counsel of Record
Deputy Corporation Counsel
LAWRENCE D. KUMABE
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street
Honolulu, Hawaii 96813
(808) 527-6008
Attorneys for Respondents
FRANK F. FASI, CITY AND COUNTY OF HONOLULU and DOUGLAS G. GIBB

QUESTIONS PRESENTED

1. Whether Petitioner ROBERT LEE ZIMMERMAN's (hereinafter "Petitioner") arrest for trespass by private security officers in public open space in a privately owned downtown commercial and high-rise office complex, after Petitioner repeatedly refused to stop handbilling, was lawful in view of clearly established United States Supreme Court precedent holding that a privately controlled commercial center is not a First Amendment "public forum" for expressive activity, and private rules by a commercial center's property managers regulating such activity are not "state action"?

2. Whether, even if the First Amendment concepts of "state action" or "public forum" are implicated here, there were nevertheless reasonable "time, place, and manner" restrictions placed by private security officers on Petitioner when he was asked to move to the public sidewalk just a few steps away?

3. Whether Respondents FRANK F. FASI, CITY AND COUNTY OF HONOLULU, and DOUGLAS G. GIBB are liable under 42 U.S.C. Section 1983 to Petitioner for this arrest in any event, where the municipal police merely took Petitioner into custody after the citizen's arrest by private security, and reasonably believed there was "probable cause" for the arrest?

JURISDICTION

The Ninth Circuit issued its decision in this case on March 17, 1992. Petitioner then filed a Petition for Rehearing *en banc*. Rehearing was denied on October 20, 1992.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. Section 1254(1). Jurisdiction in the Ninth Circuit was conferred by 28 U.S.C. Section 1291. The federal district court had federal-question jurisdiction under 28 U.S.C. Sections 1331 and 1343, and 42 U.S.C. Section 1982. It properly declined to exercise jurisdiction over the pendent state claims, once the federal claims were dismissed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
JURISDICTION i
TABLE OF CONTENTS ..... iii, iv
TABLE OF AUTHORITIES ..... v, vi, vii
STATEMENT OF THE CASE 1
A. FACTUAL BACKGROUND 2
B. PROCEDURAL BACKGROUND. 5
REASONS WHY THE WRIT SHOULD BE DENIED 6
A. INTRODUCTION - SUMMARY OF ARGUMENT 6
B. THE WRIT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THIS DECISION AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS. 9
1. Because Petitioner's Handbilling Activity Occurred On The Premises Of A Privately Owned And Controlled Commercial And Office Complex, The Ninth Circuit Court Properly Held That Petitioner's First Amendment Rights Were Not Implicated. Because Privately Owned Property Was Involved, There Is No Inconsistency With This Court's Recent Decision In *ISKCON v. Lee*, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992). 9

2. The Writ Should Be Denied Since Privately Owned And Controlled Property Is Involved. The Public Areas Of A Privately Owned Office And Commercial Complex Are Directly Analogous To A Privately Owned Shopping Mall, Rather Than To A Publicly Owned Park, As The Ninth Circuit Correctly Found. There Is No Reason To Reverse Applicable United States Supreme Court Precedents. 13

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT WITH APPLICABLE CIRCUIT COURT OF APPEALS PRECEDENT. THE CASES RELIED ON BY PETITIONER ARE INAPPOSITE. FURTHERMORE, HIS FACT-BASED ARGUMENTS ARE NOT AN APPROPRIATE SUBJECT FOR REVIEW. 14

D. THE WRIT SHOULD BE DENIED. PETITIONER'S RELIANCE ON THE "PUBLIC FUNCTION" DOCTRINE IS MISPLACED. IT HAS BEEN OVERRULED. MOREOVER, THERE IS NO REASON TO REVIEW STATE PRECEDENTS HERE, SINCE THEY PRESENT NO FUNDAMENTAL FEDERAL QUESTIONS FOR THIS COURT TO REVIEW. 16

E. THE WRIT MUST BE DENIED. PETITIONER'S REMAINING ARGUMENTS ARE ALL FACT-BASED AND ALSO INAPPROPRIATE FOR REVIEW. 17

F. THE WRIT MUST BE DENIED. EVEN IF THERE WAS A CONSTITUTIONAL DEFECT IN PETITIONER'S ARREST, THE NINTH CIRCUIT PROPERLY DISMISSED CITY DEFENDANTS SINCE THERE WAS "PROBABLE CAUSE" FOR THE TRESPASS ARREST. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: **Pages**

Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 20 L. Ed. 2d 603 (1968) 16, 17

City of Los Angeles v. Heller, 475 U.S. 796, 89 L. Ed. 2d 806, (1986) 8, 19

Collins v. Womencare, 878 F.2d 1145, 1148, *cert. denied* 110 S. Ct. 1990 (9th Cir. 1989) 6

Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 87 L. Ed. 2d 567, (1985) 6

Edwards v. Maryland State Fair and Agr. Soc., 628 F.2d 282 (4th Cir. 1980) 14

Estes v. Kapiolani Hospital, 71 Haw. 190 787 P.2d 216 (1990) 17

Hague v. Committee For Industrial Organization opinion, 307 U.S. 496, 83 L. Ed. 1423 (1939) ... 11, 12

Howerton v. Gabica, 708 F.2d 1145, 1148 (9th Cir. 1983) 6

Hudgens v. NLRB, 424 U.S. 507, 47 L. Ed. 2d 196 (1976) 7, 13, 16

Hynes v. Metropolitan Government of Nashville, 667 F.2d 549 (6th Cir. 1982) 14

Intern. Society for Krishna Consciousness v. Reber, 454 F. Supp. 1385 (Cal. 1978) 7

ISKCON v. Lee, ___ U.S. ___, 112 S. Ct. 2701, 120 L. Ed 2d 541 (1992) 9, 10, 11, 12

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 47 L. Ed. 712 (1923) 10

Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551, 33 L. Ed. 2d 131 (1972) 7, 13 17

NLRB v. Waterman Steamship Corp., 309 U.S. 206, 208 84 L. Ed. 704, 706 (1940) 16

Radich v. Goode, 886 F.2d 1391, 1398 (3d Cir. 1989) 8, 18

Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982); *cert. denied,* 460 U.S. 1012 (1983) 8, 18

State v. Furuyama, 54 Haw. 109, 637 P.2d 1095 (1981) 17

United States v. Grace, 461 U.S. 171 75 L. Ed. 2d. 736 (1983) 13

United States v. Johnston, 268 U.S. 220, 227, 69 L. Ed. 925, 926 (1925) 16

Ward v. Rock Against Racism, 491 U.S. 781, 798, 105 L. Ed. 2d 661, 680, (1989) 7

Constitutions, Statutes, and Administrative Rules:

28 U.S.C. Section 1254(1) ii

28 U.S.C. Section 1291 ii

28 U.S.C. Section 1331 ii

28 U.S.C. Section 1343 ii

42 U.S.C. Section 1982 ii

42 U.S.C. Section 1983 ..... i, 5, 6, 7

42 U.S.C. Section 1985 5

Revised Ordinances of Honolulu 1978, as amended, Article 14, Section 13-14.1 3

No. 92-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,
Petitioner,

vs.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals for the Ninth Circuit

RESPONDENTS FRANK F. FASI, CITY AND COUNTY OF HONOLULU AND DOUGLAS G. GIBB'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents FRANK F. FASI, CITY AND COUNTY OF HONOLULU and DOUGLAS G. GIBB's (hereinafter "City Defendants") counter-statement of the case follows:

A. FACTUAL BACKGROUND

The Bishop Square Complex of commercial buildings and private open space (hereinafter "Bishop Square Complex") covers an entire city block of Honolulu, bordered by Bishop, King, Alakea and Hotel Streets. CR 36:2. The Pacific Tower is located on the King Street/Alakea Street or southeast corner, and the Pauahi Tower is located on the Bishop Street/Hotel Street or northwest corner. There are more than 20 retail shops at street level. The Hotel Street/Alakea Street or northeast corner is occupied by street level commercial space and a multistory aboveground parking garage. The Bishop Street/King Street or southwest corner is occupied by a multilevel underground parking structure, the roof of which is at street level. The underground parking structure roof has been landscaped with plantings and numerous pools which border the walkways leading to the main entrances to the office towers and the ground floor commercial spaces. It is the corner of the Bishop Square Complex known as Tamarind Park. CR 36:3.

The Bishop Square Complex was owned at all times pertinent herein by Respondent NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY (hereinafter "Northwestern") and was managed by Respondent BISHOP SQUARE MANAGEMENT, INC. (hereinafter "Bishop Square"). Northwestern paid the property taxes for the area, including the street level portion referred to as Tamarind Park. CR 36:3. Bronze markers embedded in the sidewalks around Bishop Square Complex declared that it was "Private Property. Permission to use revocable at any time." CR 36:4. While the public had access through Tamarind Park to the commercial, office and retail tenants located in the Bishop Square Complex, Northwestern, the owner, had

at no time ever dedicated Tamarind Park or any portion of the Bishop Square Complex to open space or public recreational uses. CR 36:4.

Although the public had access to Tamarind Park, Regulations Pertaining to the Use of the Tamarind Park/ Bishop Square (hereinafter "Regulations") had been developed and were enforced by Northwestern and Bishop Square to ensure that Tamarind Park projected an atmosphere which would enhance the value of the commercial and office spaces in the Bishop Square Complex as well as portray the relaxed, quiet, carefree image deemed by the owner to be suitable for Tamarind Park generally. CR 36:4.

The Regulations prohibit the distribution of handbills. The rule is intended to minimize potential annoyance to persons entering the Bishop Square Complex, reduce the potential for disorder and minimize litter. The rule against distributing handbills is nondiscriminatory, and precludes all distribution on the privately owned premises. The rule is applied evenhandedly to all those who are observed distributing handbills at Tamarind Park. CR 36:5.

City Defendants did not participate in the formulation of the Regulations. The City had no financial interest in the Bishop Square Complex. It was not consulted by Bishop Square or Northwestern on any matter involving the Bishop Square Complex or its management. CR 36:5. Tamarind Park is not a "public park" as defined in the Revised Ordinances of Honolulu 1978, as amended, Article 14, Section 13-14.1. CR 36:5.

In 1988, Petitioner was a candidate for the United States Senate. CR 36:5. In the spring and summer of 1988, Petitioner or his campaign workers came upon the Bishop Square Complex to distribute handouts or sell

materials. CR 36:6. On at least eight occasions, Petitioner or his campaign workers had been present on the Bishop Square Complex distributing handouts in violation of the Tamarind Park Regulations. They were asked to comply with the Regulations or to leave the premises. On two occasions, written trespass warnings were issued by Bishop Square. CR 36:7.

Petitioner, along with several campaign workers, again appeared on the Bishop Square Complex on July 22, 1988. CR 36:7. At that time, Petitioner walked through the Tamarind Park area distributing handouts. He approached George Krater, the head of Bishop Square security, who was in the park area. Mr. Krater asked Petitioner to stop distributing handouts or move to the nearby public sidewalks. CR 36:7. Representatives of the City and County were also distributing handbills which described an upcoming entertainment event and were asked to stop. The City and County people complied with Bishop Square's request. CR 46:18. Petitioner refused, the police were summoned, and a "citizen's arrest" was made by security officer Charles Hill, an employee of Bishop Square. CR 36:7. By the time Officer J. Pedro of the Honolulu Police Department arrived to take custody of Petitioner, the citizen's arrest had already been effected.

As a result, Officer Pedro was not consulted, did not confer with Hill or any other person, nor did he give any advice on the arrest. The officer did not know, nor was he told, that Petitioner was handbilling at the time of the arrest. Officer V. Kaopu then took Petitioner into custody for transportation to the receiving desk for booking on a criminal trespass charge.

The City and County of Honolulu sometimes applies for and is given permission to provide "Aloha

Friday" concerts at the Bishop Square Complex. Its role, however, is limited to that of providing entertainment. It is not given any control over the premises surrounding the "stage" area where the entertainers perform. It does not police or enforce the rules governing the Bishop Square Complex during the Aloha Friday concerts or at any other time. The performers provided by the City, such as the Royal Hawaiian Band or the 7th Fleet's Marine Band, are no more in control of the Bishop Square Complex than the City is.

There is no "agreement" with either the Mayor or the City to provide special events at the Bishop Square Complex on certain Fridays. The City provides entertainment when entertainers are available, just like other entertainment providers. CR 36, Answer to Interrogatory #8.

B. PROCEDURAL BACKGROUND.

A complaint was filed on June 21, 1989 by Petitioner and MICHAEL J. SECTER (hereinafter "Secter"), as campaign manager for Citizens for Bob Zimmerman, naming as Defendants NORTHWESTERN MUTUAL LIFE, BISHOP SQUARE MANAGEMENT, FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu, the CITY AND COUNTY OF HONOLULU, and DOUGLAS G. GIBB, in his capacity as Chief of Police of the Honolulu Police Department. The Complaint alleged civil rights violations under 42 U.S.C. Section 1983, a conspiracy to violate Plaintiffs' constitutional rights under 42 U.S.C. Section 1985, and various pendant state tort claims. CR 1:1-18. Secter was later dismissed from the action. CR 124.

Discovery was conducted by all parties. Numerous motions were made. CR 76; CR 97:3-6. Final

judgment was filed on May 14, 1991 in favor of Defendants, and against Petitioner and Secter. CR 153:1-2. The present Notice of Appeal was filed on April 23, 1991. CR 147.

REASONS WHY THE WRIT SHOULD BE DENIED

A. INTRODUCTION - SUMMARY OF ARGUMENT

First, this case must be placed in proper perspective. It is well-established that in a 42 U.S.C. Section 1983 action alleging a violation of First Amendment rights, the framework for analysis is as follows. The reviewing court must first determine if there is "state action." This is a jurisdictional prerequisite. This finding is necessary in order to satisfy the "under color of state law" requirement in Section 1983 and the same requirement in Fourteenth Amendment, by which the First Amendment is applicable to states. In other words, only a "state," not a private party, must abridge constitutional rights to support a Section 1983 action. *See, e.g., Collins v. Womencare*, 878 F.2d 1145, 1148 *cert. denied*, 110 U.S. 1990 (9th Cir. 1989); *Howerton v. Gabica*, 708 F.2d 1145, 1148 (9th Cir. 1983).

Next, if there is "state action" and the court has jurisdiction over the claims, the court must next determine if the area involved is a "public forum," where the government's right to regulate expression can be restricted. *See, e.g., Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Obviously, if the property involved is private property, and it is neither controlled nor regulated by the

government, a "state action" and "public forum" analysis does not apply.

Finally, even if there is "state action" and a "public forum," government regulations of speech can still be upheld if reasonable; i.e., "narrowly tailored" to meet the government's interests without being the "least restrictive or least intrusive means of doing so." *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798, 105 L. Ed. 2d 661, 680, 109 S. Ct. 2746, 2757 (1989).

Against this background, it is clear that Petitioner's arguments against the City Defendants have no merit.

First, there was no "state action," the crucial requirement for a 42 U.S.C. Section 1983 claim. Both the property and the handbilling rules involved were private.

It is also well-established that where the expressive activity takes place on private property there can be no "state action." Even if the private property is open for public access, as in a shopping center or an office and shopping complex, as is the case here, the First Amendment does not apply, and the private landowner's rules governing the use of the complex are not considered "state action." *See Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976). Without "state action," there can also be no "public forum."

This is particularly true where not only is the rule forbidding political or religious solicitation privately promulgated and enforced, as is the case here, but where the rule has been applied and enforced since the inception of the private commercial project in a uniform and evenhanded manner. *Intern. Society for Krishna Consciousness v. Reber*, 454 F. Supp. 1385 (Cal. 1978).

So, Petitioner's case fails from its inception.

Second, even if there were "state action" or a "public forum" here, the City Defendants would not be liable because the police had "probable cause" to believe the arrest was valid.

At best, the First Amendment concepts here are unclear. In order for the police to determine that a privately owned and privately operated high-rise office and commercial complex in downtown Honolulu was a "public forum" and not like a privately owned shopping mall, the police would have to be familiar with legal concepts far beyond their training. Police officers are simply not expected to understand the legal complexities involved in determining First Amendment concepts like "state action" or "public forum." *See, e.g., Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989); *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982); *cert. denied,* 460 U.S. 1012 (1983).

As far as a reasonable police officer was concerned, there was "probable cause" for a trespass arrest. Therefore, if the individual police officers had "probable cause" to believe that a trespass had occurred and a citizen's arrest was warranted as the courts below have clearly found, then City Defendants are not liable. *See City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). (If police officers acted constitutionally, there can be no further Section 1983 claim against a municipality or its officers.)

B. THE WRIT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THIS DECISION AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS.

1. Because Petitioner's Handbilling Activity Occurred On The Premises Of A Privately Owned And Controlled Commercial And Office Complex, The Ninth Circuit Court Properly Held That Petitioner's First Amendment Rights Were Not Implicated. Because Privately Owned Property Was Involved, There Is No Inconsistency With This Court's Recent Decision In *ISKCON v. Lee*, ___ U.S. ___, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).

At the outset, Petitioner's petition for writ of certiorari must be dismissed because it presents no substantial federal issues for decision by this Court. The Ninth Circuit decision is amply supported by precedent. It is simply not in conflict with any decisions by this Court.

For example, in Points 1 and 2 in Petitioner's "Reasons for Granting Petition" (hereinafter "Reasons"), Petitioner argues that the "constitutional issues of free speech and warrantless arrest and seizure in public fora" are of "fundamental importance" and that his arrest was inconsistent with "long-standing precedent of the U.S. Supreme Court." (Petition at 14, 18).

However, it is axiomatic; in order to provide a basis for granting a writ of certiorari, Petitioner must demonstrate a clear, direct and irreconcilable conflict

between the court of appeals decision and applicable United States Supreme Court decisions. Mere inconsistency *in dicta* or in general principles utilized is not enough. *See, e.g., Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 47 L. Ed. 712 (1923).

ISKCON v. Lee, ____ U.S. ____, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992), is the case upon which Petitioner now primarily relies to demonstrate an inconsistency between the Ninth Circuit decision below and Supreme Court precedent. However, in that case, the airport premises at issue were publicly owned and operated. In this case, privately owned and controlled premises are involved. Therefore, no "state action" or "public forum" is possible. The *ISKCON v. Lee* case is clearly distinguishable from this case.

Furthermore, in *ISKCON v. Lee*, in spite of public ownership and open public areas, this Court nevertheless held that the municipal airport there was still not a "public forum" and never had been. In other words, the government had never consented to the use of municipal airports as soap boxes for political or religious advocacy. No public forum was involved.

Moreover, because airports were never primarily intended to be places for political or religious expression or picketing or mass public demonstrations and rallies, the Court held that the government's ban on religious solicitation was reasonable, in spite of the tremendous public traffic that passes through airport premises. This means that even the holding of the *Lee* case is inconsistent with Petitioner's argument. As this Court stated:

> The inconvenience to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem

> small, but viewed against the fact that 'pedestrian congestion is one of the greatest problems facing the three terminals,' 925 F.2d at 582, the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. . . . As a result, we conclude that the solicitation ban is reasonable.
>
> For the foregoing reasons, the judgment of the court of Appeals sustaining the ban on solicitation in Port Authority terminals is affirmed. (emphasis added).

In addition, in a fit of zeal to support his arguments, Petitioner has perhaps intentionally misquoted the Court. *See* Petitioner's Reasons at 21-22. The Court, in the *ISKCON v. Lee* case, stated that "streets and parks . . . have immemorially been held in trust for the use of the public." *See* 120 L. Ed. 2d at 550. Petitioner has embellished this quote. He added the following underlined phrase—"streets and parks, regardless of where title may reside . . . have immemorially been held in trust for use of the public." He is, of course, suggesting that privately owned parks may still be public fora.

But, if this Court were to review the *Hague v. Committee For Industrial Organization* opinion, 307 U.S. 496, 83 L. Ed. 1423 (1939), where this language is actually found, it will find that the above-mentioned reference to "where title may reside" is not a reference to private property as Petitioner is hoping the Court will believe.

Instead, by using this phrase, the Court was merely observing that title to or control over the municipal park at issue there either resided in the state

legislature or in the municipality. So, in either case, in *Hague*, public, not private, ownership was involved. It is a far cry from the situation here, where both property ownership and control is private. Therefore, this Supreme Court precedent does not help Petitioner either.

In fact, in *ISKCON v. Lee*, the Court specifically noted that privately owned parks could be developed banning speech activity. These parks are not public fora, unlike publicly held parks—the precise point City Defendants are making here. The Court stated:

> Petitioner attempts to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that it claims historically occurred at various 'transportation nodes' . . . we think such evidence is of little import for two reasons. First, much of the evidence is irrelevant to a public fora analysis, because sites such as bus and rail terminals traditionally have private ownership. . . [For example], [t]he development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks. But the reverse is also true. The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport.

Id. at 551-52.

Therefore, from a First Amendment or "public forum" standpoint, as this Court itself has repeatedly held, only publicly owned and controlled property involves "state action" and may be a "public forum." But, privately owned and controlled property, whether used

as a park or otherwise, as is at issue here, does not.

Consequently, Petitioner's request for certiorari should be denied.

2. The Writ Should Be Denied Since Privately Owned And Controlled Property Is Involved. The Public Areas Of A Privately Owned Office And Commercial Complex Are Directly Analogous To A Privately Owned Shopping Mall, Rather Than To A Publicly Owned Park, As The Ninth Circuit Correctly Found. There Is No Reason To Reverse Applicable United States Supreme Court Precedents.

Since it follows from the discussion above that this case was correctly decided, there is no reason for review or to review *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), or *Hudgens v. NLRB*, 424 U.S. 507 (1972), as Petitioner is requesting in Points 6 and 10 of his Reasons. *See* Petition at 46, 55. The public or open areas of a privately owned shopping mall or commercial and office complex, which are privately regulated and controlled, are simply not a public forum for expressive activity, as this Court has repeatedly held.

Moreover, even if a public forum was involved, the private security at the Bishop Square Complex imposed reasonable "time, place and manner" restrictions when Petitioner was asked to move to the public sidewalk that surrounded the open area just a few feet away. *See, e.g., United States v. Grace*, 461 U.S. 171 75 L. Ed. 2d. 736 (1983).

The writ of certiorari should be denied on this basis as well.

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT WITH APPLICABLE CIRCUIT COURT OF APPEALS PRECEDENT. THE CASES RELIED ON BY PETITIONER ARE INAPPOSITE. FURTHERMORE, HIS FACT-BASED ARGUMENTS ARE NOT AN APPROPRIATE SUBJECT FOR REVIEW.

Next, in Points 3 and 6 of his Reasons, Petitioner argues that the decision of the Ninth Circuit Court conflicts with precedent established by other courts of appeal. *See* Petition at 31, 46. He specifically refers to *Edwards v. Maryland State Fair and Agr. Soc.*, 628 F.2d 282 (4th Cir. 1980), and *Hynes v. Metropolitan Government of Nashville*, 667 F.2d 549 (6th Cir. 1982).

This argument is also incorrect.

Again, Petitioner's starting point for analysis is wrong. These cases are also clearly distinguishable from the instant case. Both these cases involve state fairs, where, again, publicly owned property, controlled by public or quasi-public entities, and "state action" was clearly involved. In *Edwards*, the Maryland fairgrounds at Timonium is publicly owned. The fair is run by a quasi-public corporation established and funded by the Maryland legislature and the state police patrol and enforce the rules there. Similarly, in *Hynes*, the county fair on the county fairgrounds was involved.

These cases simply cannot be compared, as the Ninth Circuit correctly found, to the high-rise office and commercial property at issue here, which is owned by a private landowner, Northwestern, and operated by a private property manager, Bishop Square, in downtown Honolulu.

Moreover, the open space or "Tamarind Park" was never dedicated to the City as a public park. This prime downtown location was considered far too valuable to deed to the City. It remained merely landscaped "open space" for a private commercial complex.

Also, the open area was never the "exclusive political preserve" of the Mayor, as Petitioner has suggested. The City merely provided entertainment infrequently there on "Aloha Fridays." As Petitioner readily admits, the Mayor's banner merely stated that it was a "Mayor's Aloha Friday Concert." Entertainment, not political expression, was provided. In addition, the entertainers donated or provided free services, contrary to Petitioner's arguments and were not paid by the City.

The Bishop Square property managers also applied their handbilling rule evenhandedly. City workers passing out programs were asked to stop and did.

Petitioner did not.

So, far from being a case with far-reaching consequences and general applicability, as Petitioner argues, this instead is rather the melancholy tale of a low-budget politician who could not generate sufficient funds for a single mundane television commercial, but who had to rely instead solely on sensationalism and confrontation to get media attention.

It is a "one-of-a-kind" situation, unusual even for Hawaii, and certainly not appropriate for Supreme Court review.

In addition, there is no reason to hold that a private commercial complex should be treated like the functional equivalent of a public park anyway, forcing the private owners to use their property like a state fair or public street. The owners have been careful here to promulgate and enforce rules to maintain an atmosphere

of dignity and restraint, free from the burden of peddlers, sidewalk hawkers and politicians.

At most, public entertainment is provided. There is no evidence of any political or religious solicitation. This kind of solicitation has been uniformly banned since the inception of the complex.

Moreover, this part of Petitioner's writ is entirely fact-based. This Court has repeatedly stated that it will not "ordinarily grant certiorari to review judgments based solely on questions of fact," *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 208, 84 L. Ed. 704, 706 (1940), and that it will "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 69 L. Ed. 925, 926 (1925).

D. THE WRIT SHOULD BE DENIED. PETITIONER'S RELIANCE ON THE "PUBLIC FUNCTION" DOCTRINE IS MISPLACED. IT HAS BEEN OVERRULED. MOREOVER, THERE IS NO REASON TO REVIEW STATE PRECEDENTS HERE, SINCE THEY PRESENT NO FUNDAMENTAL FEDERAL QUESTIONS FOR THIS COURT TO REVIEW.

Moreover, Petitioner's reliance on the "public function" doctrine in Point 4 of the Reasons is entirely misplaced. *See* Petition at 38. Private property does not become a "public forum" or the functional equivalent of a public park, merely because it is open to the public, as had been held in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 20 L. Ed. 2d 603 (1968). In *Hudgens v. NLRB*, 424 U.S. at 518, the Court specifically held that "[t]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd*

case . . . the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley* . . ."

Logan Valley is no longer sound law.

Next, Petitioner's reliance in Point 5 of the Reasons on State Supreme Court precedent, such as *State v. Furuyama*, 54 Haw. 109, 637 P.2d 1095 (1981), and *Estes v. Kapiolani Hospital*, 71 Haw. 190 787 P.2d 216 (1990), is similarly misplaced.

It is not this Court's function to review state law precedents, no matter how interesting they may be. The Ninth Circuit Court adequately disposed of the state law arguments.

E. THE WRIT MUST BE DENIED. PETITIONER'S REMAINING ARGUMENTS ARE ALL FACT-BASED AND ALSO INAPPROPRIATE FOR REVIEW.

Petitioner's Point 7 on additional discovery and Point 8 on recusal are fact-based inquiries of no general applicability, presenting no federal questions worthy of review by this eminent court. *See* Petition at 49, 53.

Petitioner's Point 9 requesting review of the state torts at issue here is also inappropriate and does not merit further discussion. *See* Petition at 54.

The writ should be denied on these grounds as well.

F. THE WRIT MUST BE DENIED. EVEN IF THERE WAS A CONSTITUTIONAL DEFECT IN PETITIONER'S ARREST, THE NINTH CIRCUIT PROPERLY DISMISSED CITY DEFENDANTS SINCE THERE WAS "PROBABLE CAUSE" FOR THE TRESPASS ARREST.

Finally, and perhaps most importantly, even if there was a constitutional defect in the arrest, it does not change the result as to City Defendants. Police officers are not expected to understand the legal complexities involved in determining the existence of "state action" or a "public forum" or to assess these complexities in the field. *See Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989)("[W]e cannot impose upon a police officer or a city official authorizing the arrest policy the duty to correctly predict how a court will answer this unresolved and complex legal issue."); *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 450 U.S. 1012 (1983) (Police officers cannot be held to . . . a legal scholar's expertise in constitutional law.")

The record is clear that the police officers merely took Petitioner into custody after being called by the Security at Bishop Square after the citizen's arrest for trespass. From the standpoint of the officers, the trespass arrest in open space in the complex just outside the shops and restaurants was no different from a similar arrest in the public areas of a shopping mall. In either event, a patron who refused to leave or abide by the security's rules would be involved.

Therefore, it is clear beyond doubt that the police had "probable cause" for the arrest, as the Ninth Circuit Court found. Therefore, City Defendants are not liable

even if Petitioner prevails in his constitutional arguments.

In *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, (per curiam), this Court held that a municipality or its officers cannot be held liable under Section 1983 if the individual employee's actions, which form the basis for the suit, have been determined not to inflict any constitutional injury on the plaintiff.

CONCLUSION

For the reasons above-cited, City Defendants respectfully request that Petitioner's Petition for Writ of Certiorari be denied and that City Defendants be given such other relief as this Honorable Court may deem proper.

DATED: Honolulu, Hawaii, February 17, 1993.

Respectfully submitted,

RONALD B. MUN
Corporation Counsel
DAVID C. LAXSON
Counsel of Record
Deputy Corporation Counsel
LAWRENCE D. KUMABE
Deputy Corporation Counsel
Attorneys for Respondents
FRANK F. FASI,
CITY AND COUNTY OF
HONOLULU and
DOUGLAS G. GIBB